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An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards

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I. INTRODUCTION

As the cost and delay of litigation in national courts continue to rise, parties contemplating a contractual relationship have sought alternative methods of dispute resolution. One of the most prevalent techniques of alternative dispute resolution is arbitration. In fact, in recent decades, a profusion of organizations have sprung into being, specializing in both national and international arbitration.¹ Nation-states also have encouraged the use of arbitration by passing legislation recognizing, both nationally and internationally, the enforceability of agreements to arbitrate and any corresponding arbitral awards. Furthermore, national courts have encouraged the use of arbitration by interpreting liberally these national and international accords in favor of arbitration.

This Article will focus on current attempts by parties to expand or limit contractually the scope of judicial review of arbitral awards. Specific attention will be paid to the differing public policy implications that such expansion or limitation may have on both national and international arbitration. In order to gain an overview of the current situation, the first Part of this Article will focus upon the prevailing law on judicial review of arbitral awards. In this regard, traditional judicial review is extremely limited by both national legislation and international treaty.

The second Part will explore recent attempts by parties both to expand and limit the traditional scope of judicial review. In the context of the expansion of judicial review, differing opinions of various U.S. courts will be discussed in order to gain insight into the issues and implications of such an expansion. On the other hand, in regards to the limitation of judicial review, various opinions of English Commonwealth and European jurisdictions will be explored.

Finally, the last Part will discuss the apparent conflicting public policy goals behind the contractual expansion and limitation of the judicial review of arbitral awards. The focus will be on several intrinsically important yet

¹ Many of these arbitral organizations, such as the International Chamber of Commerce and the American Arbitration Association, located in Paris and New York, respectively, were formed many decades ago. However, in the last few decades an abundance of new and increasingly geographically specialized organizations have come into existence.

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seemingly irreconcilable goals behind both commercial transactions and arbitration, such as freedom of contract versus predictability and certainty of arbitral awards. This Part will advance solutions and attempt to reconcile these public policy goals in order to maintain the greatest freedom of contract while, at the same time, assuring the quick and certain resolution of disputes. Specifically, this Article will advocate that freedom of contract and the ability of arbitrators to settle disputes quickly and efficiently can be maintained best by the recognition of agreements limiting judicial review of arbitral awards while simultaneously invalidating those agreements attempting to expand review. Only through such a method can the integrity of the arbitral process be maintained and the quick resolution of disputes be assured, which, in the end, is the ultimate goal of any contractual provision involving the resolution of disputes.

II. JUDICIAL REVIEW OF ARBITRAL AWARDS UNDER CURRENT NATIONAL AND INTERNATIONAL CONVENTIONS

Traditionally, national courts have intervened in arbitral proceedings in the following two situations: first, at the onset of arbitration to determine whether the agreement to arbitrate is valid and enforceable or, in other words, whether the issue itself is arbitrable or whether it concerns an area where public policy dictates that all such disputes be resolved by the courts; and second, at the end of an arbitration, when a court is asked to enforce an arbitral award and the court reviews the award to ensure that the award's enforcement will not violate any procedural due process or other public policy concerns. As arbitration has gained acceptance, both nationally and internationally, the United States and foreign nations have passed legislation to enforce both agreements to arbitrate and arbitral awards.

In the United States, Congress enacted the Federal Arbitration Act² (FAA) in 1925. The expressed intention of the FAA was to reverse past judicial animosity toward arbitration and place arbitration agreements "upon the same footing as other contracts."³ On an international scale, most of the world's leading trading nations, including the United States, have acceded to the New York Convention on the Recognition and Enforcement of Foreign

² 9 U.S.C. §§ 1-16 (1994).

³ H.R. REP. NO. 68-96, at 1 (1924). See *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1010-11 (S.D.N.Y. 1915), for an example of the early U.S. judicial hostility toward arbitration. Also, for a discussion of the English tradition and history leading to this initial distrust of arbitration, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942).

Arbitral Awards⁴ (the "New York Convention"). The FAA and the New York Convention reversed the traditional judicial hostility towards arbitration and succeeded in transforming the United States into an "arbitration friendly" jurisdiction.⁵ Today, U.S. courts routinely validate and enforce arbitral agreements even though they may implicate fundamental issues of deeply held public policy, such as securities violations,⁶ RICO claims,⁷ antitrust causes of action,⁸ employment discrimination,⁹ and civil rights cases,¹⁰ to name just a few.¹¹

However, judicial recognition of arbitral agreements is only the first step; courts still need to recognize and enforce corresponding awards by arbitrators. Long before the enactment of either the FAA or the New York Convention, the United States Supreme Court held that arbitral awards

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The terms of the New York Convention were made binding upon the United States by its own law. See 9 U.S.C. §§ 201–208 (1994) (providing, inter alia, that the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts . . .").

⁵ See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (finding that the FAA "accomplishes [its] purpose" of reversing the policy of judicial hostility to the enforcement of arbitration agreements).

⁶ See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–20 (1974); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479–85 (1989), *overruling Wilko v. Swan*, 346 U.S. 427 (1953).

⁷ See, e.g., *McMahon*, 482 U.S. at 238–42.

⁸ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–40 (1985).

⁹ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–35 (1991) (holding that causes of action arising under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621–634 (1994 & Supp. III 1997), are arbitrable, and reversing the United States Court of Appeals for the Third Circuit's decision in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989)).

¹⁰ See, e.g., *Feinberg v. Bear, Stearns & Co.*, No. 90 Civ. 5250 (JFK), 1991 WL 79309, at *2–*7 (S.D.N.Y. May 3, 1991). However, the arbitrability of Title VII and other civil rights causes of action remains controversial. See G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 569–70 (1990).

¹¹ In fact, in recent years there have been relatively few areas in which the federal courts have not allowed parties to arbitrate disputes because of public policy concerns. See *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 118–22 (2d Cir. 1991); see also *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1115–21 (3d Cir. 1993) (holding claims under the Employee Retirement Income Security Act arbitrable); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987) (ruling that claims under the Robinson-Patman Price Discrimination Act can be arbitrated).

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should be enforced to assure the quick settlement of disputes and encourage the use of arbitration as an alternative dispute resolution technique.¹² In keeping with this tradition, both the FAA and the New York Convention specifically hold that enforcement of arbitral awards should be granted and upheld routinely.¹³ Nonetheless, the FAA and New York Convention both contain similar “laundry lists” of exceptions by which a court may vacate an arbitral award.¹⁴ These exceptions include various safeguards to assure that minimum levels of procedural and substantive due process are observed in arbitral proceedings,¹⁵ a public policy exception to enforcement,¹⁶ and, in the United States, a judicially created exception to enforcement where an award is rendered in “manifest disregard” of the law.¹⁷

¹² In *Burchell v. Marsh*, 58 U.S. 344 (1854), the United States Supreme Court stated:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

Id. at 349.

¹³ See Federal Arbitration Act §§ 2, 9, 9 U.S.C. §§ 2, 9 (1994); New York Convention, *supra* note 4, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.

¹⁴ See Federal Arbitration Act § 10, 9 U.S.C. § 10 (1994); *see also* New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42. The grounds for vacating an arbitral award under the FAA are located in section 10 and include, among other things, the following: cases in which the award was procured by corruption, fraud, or undue means, 9 U.S.C. § 10(a)(1); cases in which evidence of arbitrator impartiality or corruption, *see id.* § 10(a)(2); cases involving arbitrator misconduct which prejudices the rights of the parties, *see id.* § 10(a)(3); and cases in which the arbitrators exceeded their powers, *see id.* § 10(a)(4). On the other hand, Article V of the New York Convention contains similar rationales for refusing award recognition and enforcement, including the following: party incapacity or the agreement was invalid for some other reason under the applicable law, *see* New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 40; a party lacked proper notice of the arbitral proceedings or was otherwise unable to present a case, *see id.*, 21 U.S.T. at 2520, 330 U.N.T.S. at 42; the award contained decisions on matters beyond the scope of the arbitration agreement, *see id.*; the subject matter was nonarbitrable, *see id.*; and enforcement would be contrary to the public policy of the enforcing country, *see id.*

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II.B.

¹⁷ See *infra* Part II.C.

A. Procedural and Substantive Due Process Exceptions to Award Enforcement

The FAA and the New York Convention both contain exceptions to an arbitral award's enforcement to assure that a certain level of procedural and substantive due process is observed in the arbitral proceedings. A commonly asserted exception to enforcement by a party attempting to annul an arbitral award is that the arbitrators "exceeded their powers,"¹⁸ or, phrased differently, that the award dealt with issues beyond the scope of the agreement to arbitrate.¹⁹ This exception rarely is employed successfully, for several reasons. First, the use of standardized arbitration clauses in commercial contracts provides assurance that the scope of an arbitral clause will encompass almost every conceivable issue.²⁰ Second, courts rarely second guess and overrule an arbitrator's construction of the parties' agreement to arbitrate due to the fact that there exists a judicially created "powerful presumption" that the arbitrator acted within his power.²¹ Third, courts liberally construe agreements to arbitrate to include most issues within their scope, even when the scope of an agreement is questionable.²²

¹⁸ 9 U.S.C. § 10(a)(4).

¹⁹ See New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

²⁰ Various international arbitration organizations have promulgated standard arbitration clauses that are recognized internationally as enveloping most, if not all, issues of litigation within their scope. See, e.g., ARBITRATION RULES, MODEL ARBITRATION CLAUSE art. 1.1 n.* (United Nations Comm'n on Int'l Trade Law 1976) ("Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present force."); INT'L ARBITRATION RULES, MODEL ARBITRATION CLAUSE (Am. Arbitration Ass'n 1992) ("Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in . . . accordance with the International Arbitration Rules of the American Arbitration Association."); RULES OF CONCILIATION AND ARBITRATION, STANDARD ICC ARBITRATION CLAUSE (Int'l Chamber of Commerce 1988) ("All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.").

²¹ *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rafta)*, 508 F.2d 969, 976-77 (2d Cir. 1974); *Avraham v. Shigur Express Ltd.*, No. 91 Civ. 1238 (SWK), 1991 U.S. Dist. LEXIS 12267, at *7-*14 (S.D.N.Y. Sept. 3, 1991).

²² In the United States, see *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). In England, see *Ulysses Compania Naviera SA v. Huntingdon Petroleum Services Ltd.*, 1 Lloyd's Rep. 160, 163-66 (Q.B. Com. Ct. 1990). The tendency of courts to interpret arbitral clauses as including within their scope questionable issues is probably part of the overall tendency of both courts and

Other due process concerns focus on the inability or difficulty of the arbitral process to subpoena witnesses or conduct discovery on the same level as that of a national court. Nonetheless, U.S. courts have stated that a party, by agreeing to arbitrate, relinquishes its right to subpoena witnesses and other rights that it may have had in court in favor of arbitration, with all of its “advantages and drawbacks.”²³ Therefore, the mere inability to produce witnesses is not sufficiently violative of a party’s due process rights to avoid enforcement of a corresponding arbitral award. Courts are likewise reluctant to enjoin the enforcement of an arbitral award even on the grounds of fraud, holding that “the fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration” and must “relate to a material issue.”²⁴ Moreover, a party contending that an award should not be enforced due to a procedural deficiency first must demonstrate that the right to contest the procedural deficiency was preserved during the arbitral proceeding. In other words, the party must show that the procedural deficiency was presented to the arbitral tribunal and ignored in order to employ the deficiency as an argument for avoiding enforcement of the award.²⁵

The FAA and the New York Convention also provide exceptions to the enforcement of an award on the basis of party incapacity, illegality of the arbitral agreement, and arbitrator corruption or fraud.²⁶ These exceptions to enforcement are of the type that would prevent even the enforcement of a judicial award. However, courts seldom deny the enforcement of an award on these bases. This is mainly due to the fact that these exceptions deal with extreme situations that rarely manifest themselves. Nevertheless, even when arbitrator corruption or fraud is suspected, the party opposing the award must corroborate evident partiality by focusing on the relationship between the arbitrators and the other party, such as economic or personal ties between the two.²⁷ Arbitrator corruption or fraud “cannot be inferred simply” from

legislatures to eliminate the historical judicial hostility towards arbitration. *See supra* notes 2–12 and accompanying text.

²³ *Parsons*, 508 F.2d at 975; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

²⁴ *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 814 (D. Del. 1990); *see also* *LaFarge Conseils et Etudes v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986).

²⁵ *See* *International Std. Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 180 (S.D.N.Y. 1990).

²⁶ *See* Federal Arbitration Act § 10(a)(1)–(2), 9 U.S.C. § 10(a)(1)–(2) (1994); New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42.

²⁷ *See* *Sidarma Societa Italiana di Armamento Spa, Venice v. Holt Marine Indus., Inc.*, 515 F. Supp. 1302, 1306 (S.D.N.Y. 1981), *aff’d*, 681 F.2d 802 (2d Cir. 1981).

the fact that the arbitrator's findings were unsupported by the weight of the evidence.²⁸

Parties opposing an arbitral award have attempted to annul enforcement on the basis that the arbitration agreement constituted a contract of adhesion. Courts have denied these attempts to describe arbitral agreements as contracts of adhesion affirmatively and categorically.²⁹ Finally, parties opposing an arbitral award have attempted to re-employ the nonarbitrability defense by reasserting, at the award enforcement stage, that a court should refuse enforcement because the underlying issue was nonarbitrable at the outset.³⁰ In reality, the nonarbitrability exception to award enforcement is rarely asserted.³¹ Moreover, recent case law from the United States Supreme Court in the last few decades further has regulated the nonarbitrability exception to award enforcement to a mere academic oddity.³² In fact, some commentators suggest that U.S. courts should cease altogether to recognize the nonarbitrability defense in award enforcement proceedings.³³

The procedural and substantive due process exceptions to award enforcement, while frequently pleaded, are rarely successful. The nonarbitrability of the subject matter exception is merely an attempt to relitigate the arbitrability question, which properly should be litigated, if at all, before the arbitration begins; and the United States Supreme Court has consistently found in favor of arbitration. The other due process exceptions to enforcement, such as scope of the arbitral clause, discovery deficiencies,

²⁸ *In re Southwind Shipping Co.*, 709 F. Supp. 79, 83 (S.D.N.Y. 1989).

²⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-33 (1985); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, No. 91-13345 WF, 1993 U.S. Dist. LEXIS 5672, at *8-*13 (D. Mass. Apr. 19, 1993) (holding that arbitration clauses are not per se adhesional and, even if they were, that they are not unconscionable, and as such are not void as contracts of adhesion), *aff'd*, 515 U.S. 528, 532 (1995) (affirming the district court's opinion without further comment on the contract of adhesion issue).

³⁰ See, e.g., *New York Convention*, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

³¹ The Second Circuit quickly rejected the nonarbitrability exception, reasoning that "the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable." *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rafta)*, 508 F.2d 969, 975 (2d Cir. 1974).

³² See *supra* notes 6-11 and accompanying text.

³³ See, e.g., Heather R. Evans, *The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in the United States Federal Courts*, 21 N.Y.U. J. INT'L L. & POL. 329, 352 (1989).

and arbitrator corruption or fraud arise either from poorly worded arbitration agreements or from problems in the arbitral process. As arbitration has become more accepted and employed, both arbitral clauses and the arbitral process have improved, limiting the need of these exceptions to enforcement. However, the due process exceptions are not the only exceptions to enforcement. On the contrary, the most frequently employed and litigated enforcement exception is the public policy exception, which is complicated by the various choices of law open to parties to an arbitration.

B. The Public Policy Exception to Award Enforcement

The New York Convention and the FAA both dictate that an enforcing court may³⁴ refuse to recognize or enforce an arbitral award if enforcement of such an award would be contrary to the public policy of the enforcing nation.³⁵ The public policy exception to award enforcement is the most widely asserted exception to award enforcement, especially in respect to foreign arbitral awards or awards based on foreign law. In fact, the United States Supreme Court, on numerous occasions, specifically has reserved the right at the award enforcement stage to review an award to assure that the combination of choice-of-forum and choice-of-law clauses in an agreement to arbitrate did not serve to defeat statutorily protected rights in violation of public policy.³⁶

The public policy exception is only to be employed "where enforcement would violate [a] forum state's most basic notions of morality and justice."³⁷ This restricted interpretation of the public policy exception is warranted in order to safeguard the proarbitration policies of the New York Convention and the FAA and to prevent the creation of a public policy loophole encompassing not only foreign awards being enforced in the United States,

³⁴ It should be noted at this juncture that even the public policy exception to enforcement is discretionary in nature, meaning that even if an award violates the public policy of an enforcing nation, that nation still may grant recognition and enforcement to the award.

³⁵ See Federal Arbitration Act § 10, 9 U.S.C. § 10 (1994); New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

³⁶ See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

³⁷ *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rafta)*, 508 F.2d 969, 974 (2d Cir. 1974).

but also U.S. awards being enforced abroad.³⁸ The public policy exception is further limited by the nature of the dispute and the type of public policy involved. The nature of the transaction and the nationality of the parties involved determines which of the following three types of public policy are relevant: domestic, international, or transnational public policy. The standard of review for annulling an arbitral award differs depending on which type of public policy is applicable.

1. *Domestic Public Policy*

In a domestic arbitration (i.e., an arbitration involving only one nation and citizens of only that one nation), an enforcing court need only take cognizance of national public policy notions.³⁹ The standard of review is whether the arbitral award would violate local standards of morality and justice.⁴⁰ Because the underlying transaction only concerns one nation, the enforcing court only needs to consider that nation's public policy, which is usually its own notion of public policy. In the United States, domestic public policy consists of those notions that would vitiate any contractual relationship whether or not the contract contained an agreement to arbitrate. In other words, the outside limit of domestic public policy is the parties' freedom of contract under the interested nation's laws.⁴¹

2. *International Public Policy*

In an international arbitration (i.e., an arbitration involving two or more nations and citizens of two or more nations), an enforcing court needs to take cognizance not only of its own public policy, but also the public policy of other interested nations and the special needs of international commerce. Consequently, international public policy consists of those national public policy concerns that also should be applied in an international context.⁴² One nation's public policy "should prevail only if warranted by the nature of the dispute," statute, or public policy objective involved, which should be determined by comparing the connections existing between the case at hand

³⁸ See *id.* at 973-74; see also *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987) (questioning the continued viability of the public policy exception).

³⁹ See Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, AM. BUS. L.J. 511, 513 (1988).

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 514.

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and each of the nations involved in the dispute.⁴³ In other words, international public policy is a balancing of the interests between the various nations involved and the needs of international commerce for an equitable resolution of international disputes.

Almost every major trading nation, either explicitly or by implication, considers and employs international public policy when deciding whether to enforce a foreign arbitral award. For example, French jurisprudence specifically delineates between domestic public policy and international public policy.⁴⁴ On the other hand, U.S. jurisprudence views the international aspect of an arbitration as a mitigating factor in deciding whether an award is enforceable.⁴⁵ No matter whether a court specifically differentiates between national and international public policy, it is clear that annulling an international arbitral award on public policy grounds is extremely difficult. Only in the situation of a foreign arbitral forum and foreign choice-of-law clause “operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies” will a court condemn the award as against public policy.⁴⁶

⁴³ ANDREAS BUCHER & PIERRE-YVES TSCHANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 105 (1989).

⁴⁴ See *Société Labinal v. Sociétés Mors et Westland Aerospace*, 4 *REVUE DE L'ARBITRAGE* 645, 650 (1993); *Société Almira Films v. Pierrel es Quai*, 4 *REVUE DE L'ARBITRAGE* 711, 714–15 (1989).

⁴⁵ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (holding that courts should be slower to annul international arbitral agreements and awards because of “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system”). However, U.S. courts specifically distinguish between “national” and “public” policy by declaring that the public policy exception to enforcement should not “enshrine . . . international politics under the rubric of ‘public policy.’” *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (Rafta)*, 508 F.2d 969, 974 (2d Cir. 1974); see also *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819–20 (D. Del. 1990); *Antco Shipping Co. v. Sidermar*, 417 F. Supp. 207, 216–17 (S.D.N.Y. 1976).

⁴⁶ *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi*, 473 U.S. at 637 n.19). It should be noted that while this black letter law is frequently quoted, rarely do courts ever find that the combination of foreign choice-of-forum and choice-of-law clauses has operated to waive a party’s statutory rights to the extent warranting denial of enforcement of an arbitral award. See Buchanan, *supra* note 39, at 519.

3. Transnational Public Policy

The third type of public policy considered by national courts in the recognition and enforcement of arbitral awards is transnational public policy.⁴⁷ Transnational public policy represents the "international consensus as to universal standards of accepted norms or conduct that must always apply and provide limitations to public as well as private international relationships and transactions."⁴⁸ A national court need consider transnational public policy only when the arbitration is both international in scope and subject to the *lex mercatoria*.⁴⁹

The *lex mercatoria*, or "law merchant," is a governing law that has no direct connection to any national law but rather represents a combination of "rules of law which are common to all or most of the States engaged in international trade."⁵⁰ The *lex mercatoria* often is selected as a governing law by parties to an international agreement as a method to avoid being subjected to an undesirable foreign law when the parties cannot mutually decide upon another governing law. This situation often arises when one of the parties is a state or state-dominated enterprise, but it is not necessarily limited to those circumstances.⁵¹ The use of the *lex mercatoria* is highly controversial and many even have questioned the very existence of the *lex mercatoria*.⁵² However, for every detractor, there are those who steadfastly believe in the existence of the *lex mercatoria*,⁵³ and, in fact, the *lex*

⁴⁷ See Buchanan, *supra* note 39, at 514.

⁴⁸ *Id.*

⁴⁹ See *id.* at 514-15.

⁵⁰ Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 747 (1985). The definitions of the *lex mercatoria* are many and diverse. Various authorities have described the *lex mercatoria* as an autonomous legal order "independent of any one national legal system," Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 ARB. INT'L 133, 144 (1990), and as representing "generally accepted customs of merchants" that "have standardized over the years and become part of formal law." Buchanan, *supra* note 39, at 511 n.2.

⁵¹ See BUCHER & TSCHANZ, *supra* note 43, at 106.

⁵² See, e.g., F.A. Mann, *England Rejects "Delocalized" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193, 196-97 (1984). See generally Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1989); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989).

⁵³ See generally Berthold Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113 (Julian D.M. Lew ed., 1987); Philippe Kahn, *La Lex Mercatoria: Point de Vue Français Après Quarante ans de Controverses*, 37 MCGILL L.J. 413 (1992).

mercatoria has been employed as the governing law in various international contracts.⁵⁴ The major problem hampering the use of the *lex mercatoria* in international arbitration is the uncertainty over the exact definition and parameters of the *lex mercatoria*. Notwithstanding this uncertainty, it is clear that the *lex mercatoria* does exist, and, increasingly, international treaties, model laws, and private organizations specializing in codifying international trade norms are continuing to diminish this uncertainty by formulating and elucidating generally accepted norms of commercial trade.

A court reviewing an international arbitral award based on the *lex mercatoria* should apply “fundamental general principles of law without inquiring whether the dispute has any relationship to a particular state.”⁵⁵ In this way, transnational public policy is differentiated from international public policy, for which a reviewing court must consider the public policy of all interested states.⁵⁶ Those transnational principles comprising the *lex mercatoria* originate from the “international community of states” and therefore “must be respected as international obligations of states” and remain “independent from any relationship [the particular case] might have to one state or another.”⁵⁷

C. The “Manifest Disregard of the Law” Exception to Award Enforcement

The statutory exceptions to award enforcement enunciated in the FAA and New York Convention, while the most frequently asserted exceptions by parties attempting to avoid enforcement of an arbitral award, are not the only exceptions to award enforcement. In U.S. jurisprudence, there exists a nonstatutory exception to an arbitrator’s award for those situations in which an award is deemed in “manifest disregard of the law.”⁵⁸

⁵⁴ See *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat’l Oil Co.*, 2 All E.R. 769, 778–79 (C.A. 1987); *Eagle Star Ins. Co. v. Yuval Ins. Co.*, 1 Lloyd’s Rep. 357, 359, 361–62 (C.A. 1977); see also *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.*, 1 All E.R. 664, 670–91 (H.L. 1993).

⁵⁵ *BUCHER & TSCHANZ*, *supra* note 43, at 120.

⁵⁶ See *Buchanan*, *supra* note 39, at 513–14.

⁵⁷ *BUCHER & TSCHANZ*, *supra* note 43, at 121.

⁵⁸ See, e.g., *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (stating that an arbitrator’s award “will not be confirmed if it is demonstrated that the arbitrator acted in ‘manifest disregard of the law.’” (quoting *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))).

As a general rule, an arbitral award cannot be set aside for errors in law or fact by the arbitrators. The Supreme Court of the United States, long before the drafting of either the FAA or the New York Convention, held that if an arbitral award is within the submission of the arbitrators, a court "will not set it aside for error, either in law or fact."⁵⁹ Despite this steadfast refusal to recognize errors of law or fact as a basis for denying enforcement of an award, parties have attempted to circumvent the Supreme Court and argue that awards in "manifest disregard of the law" should not be enforced.⁶⁰ The "manifest disregard" exception to award enforcement stems from the case of *Wilko v. Swan*,⁶¹ in which the Court held that a domestic dispute involving the Securities Act of 1933 was not arbitrable.⁶²

In *Wilko*, the Court stated that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error . . ."⁶³ In spite of the fact that the Court subsequently overruled *Wilko*,⁶⁴ parties alleging that an arbitrator erred in a matter of law have expanded the language of *Wilko* into a nonstatutory exception to award enforcement.⁶⁵

The manifest disregard exception is to be construed conservatively and employed rarely. An arbitrator not only must appreciate the existence of a clearly governing and understandable legal principle but also decide to ignore it in order for a corresponding award to be in manifest disregard of

⁵⁹ *Burchell v. Marsh*, 58 U.S. 344, 349 (1854); *see also supra* note 12 and accompanying text. The Supreme Court recently reaffirmed its ruling in *Burchell* by holding that "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United States Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

⁶⁰ *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

⁶¹ 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

⁶² *See id.* at 438.

⁶³ *Id.* at 436.

⁶⁴ At first, the Supreme Court merely distinguished *Wilko*, a domestic case, from international cases, holding that international arbitrations involving securities disputes were arbitral, while domestic cases were nonarbitral. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228-29 (1987). However, a few years later, the Supreme Court completely reversed the *Wilko* opinion and declared that "*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements . . ." *Rodriguez de Quijas*, 490 U.S. at 484; *see also supra* notes 5-6 and accompanying text.

⁶⁵ *See, e.g., Bobker*, 808 F.2d at 933.

the law.⁶⁶ This conservative application of the manifest disregard exception has been followed consistently by U.S. courts.⁶⁷ In fact, many courts seriously question whether the manifest disregard exception really exists, and others specifically limit this judicial exception to domestic arbitrations, holding that in international arbitrations under the New York Convention, no such exception exists.⁶⁸ Therefore, while courts may cite and consider the manifest disregard exception to award enforcement, in reality, the exception is little more than a historical oddity that is rarely, if ever, successfully asserted.⁶⁹ Finally, the U.S. viewpoint that arbitrators need not explain their reasoning further limits the manifest disregard exception, because without a written opinion, it is almost impossible to determine whether an arbitrator understood a legal principle but ignored the principle.⁷⁰

The passage of the FAA and the New York Convention, and the corresponding strict judicial interpretation of their provisions, has helped to advance the use of international arbitration by assuring that arbitral awards are recognized and enforced by national courts. Despite the success, or perhaps because of the success, of the FAA and New York Convention, parties have attempted both to limit and expand judicial review of arbitral awards contractually. Such attempts have met with mixed success for a variety of reasons.

⁶⁶ See *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985).

⁶⁷ See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rafta)*, 508 F.2d 969, 977 (2d Cir. 1974); *In re Southwind Shipping Co.*, 709 F. Supp. 79, 83-84 (S.D.N.Y. 1989).

⁶⁸ See *Parsons*, 508 F.2d at 977; *Avraham v. Shigur Express Ltd.*, No. 91 Civ. 1238 (SWK), 1991 U.S. Dist. LEXIS 12267, at *10 (S.D.N.Y. Sept. 3, 1991); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987); see also *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) ("Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.").

⁶⁹ See, e.g., *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461-64 (11th Cir. 1997) (employing the manifest disregard exception to vacate an arbitral award, but only after holding that the arbitration panel's award specifically noted that counsel for the successful party made a blatant appeal to the arbitrators to disregard the law); see also *Daniel Blonsky, The 11th Circuit Puts a Major New Dent in the Armor Surrounding Arbitration Awards*, FLA. B.J., Apr. 1998, at 74, 76.

⁷⁰ See *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972).

III. CONTRACTUAL EXPANSION AND LIMITATION OF JUDICIAL REVIEW AT THE AWARD ENFORCEMENT STAGE

Parties agree to arbitrate disputes for several reasons. For instance, in international agreements, arbitration is considered a neutral forum when parties cannot agree on which nation's courts should have jurisdiction over a dispute. Arbitration also is considered generally less time consuming and expensive than litigation. Further, in arbitral proceedings, parties, to a certain extent, can control the makeup of the arbitral panel, thereby employing arbitrators who possess knowledge and expertise in certain areas of the law or business community.⁷¹ The advantages of arbitration are united in a common thread. In order to benefit from these advantages, any corresponding arbitral award needs to be recognized and enforced by national courts. The FAA, on a national scale, and the New York Convention, on an international scale, have gone a long way to unify arbitration law and assure the enforceability of awards. However, in some instances, parties to agreements to arbitrate have attempted to alter the effect of the FAA and New York Convention contractually, either by expanding or limiting judicial review of arbitral awards.

A. Contractual Expansion of Judicial Review

The standard of judicial review under the FAA and New York Convention, as discussed above in detail, is extremely limited. The effect of this limited judicial review is that the vast majority of arbitral awards are recognized and enforced as a matter of course not only in U.S. courts but also around the world. In this regard, parties have attempted to enlarge the judicial role in reviewing arbitral awards contractually beyond that contemplated by the FAA and New York Convention. These attempts have met with mixed results—some being enforced on the theory of freedom of contract and others being denied on the basis of preserving the integrity of the arbitral process in accordance with public policy underlying the FAA and New York Convention.

⁷¹ For an exhaustive listing of the strengths of arbitration, see Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 947–56 (1996).

1. *The Freedom of Contract Viewpoint*

In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,⁷² the United States Court of Appeals for the Fifth Circuit held that the Federal Arbitration Act does not prohibit parties who voluntarily agree to arbitration from providing contractually for a more expansive judicial review of an award than the default standard provided in the FAA.⁷³ In *Gateway*, MCI Telecommunications Corp. (MCI), after successfully bidding on a government contract to supply telephone service to state inmates, subcontracted with Gateway Technologies, Inc. (Gateway) to furnish, install, and maintain all the equipment necessary to provide automated collect calls.⁷⁴ The subcontract agreement contained an arbitration clause providing that in the event any disputes between the parties arose, the parties agree to binding arbitration, "except that errors of law shall be subject to appeal."⁷⁵

A dispute arose between the parties with MCI contending that the Gateway automated system design was improperly completing many collect calls, and Gateway responding by alleging that MCI merely wished to integrate the Gateway system into its own, thereby realizing a significant profit.⁷⁶ Eventually, MCI integrated the two systems and terminated its contract with Gateway. The dispute was submitted to arbitration, and "the arbitrator found that MCI had breached its contractual duty to negotiate in good faith and awarded actual as well as punitive damages to Gateway."⁷⁷ The United States District Court for the Northern District of Texas confirmed the arbitral award, refusing to review the award under a strict "errors of law" analysis, in deference to the federal policy favoring arbitration.⁷⁸ MCI appealed, arguing that the court erred in not reviewing the award for "errors of law" in accordance with the parties' agreement to arbitrate disputes.

The Fifth Circuit held that such a contractual modification expanding the court's power to review an arbitral award was acceptable because "arbitration is a creature of contract."⁷⁹ The court reasoned that the public policy purpose of the FAA was to assure that private agreements to arbitrate

⁷² 64 F.3d 993 (5th Cir. 1995).

⁷³ See *id.* at 997.

⁷⁴ See *id.* at 995.

⁷⁵ *Id.*

⁷⁶ See *id.* at 995 n.2.

⁷⁷ *Id.* at 996.

⁷⁸ *Id.*

⁷⁹ *Id.*

are enforced according to their terms and that “the FAA’s pro-arbitration policy does not operate without regard to the wishes of the contracting parties.”⁸⁰ The Fifth Circuit rejected the district court’s unwillingness to enforce the parties’ contract because “the parties have sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review.”⁸¹ While conceding that the parties’ agreement to expand judicial review may not have been “prudent,” the Fifth Circuit reasoned that federal arbitration policy demanded that the court conduct its review according to the terms of the arbitration contract.⁸²

The Fifth Circuit in *Gateway* relied upon several United States Supreme Court decisions in which the Court upheld a party’s right to select the procedural rules that will govern an arbitration.⁸³ However, *Gateway* did not concern the selection of procedural rules governing the arbitral process but rather concerned the judicial enforcement of a corresponding award. Nonetheless, the decision in *Gateway* is not without precedent. Other federal and state courts have upheld the contractual expansion of judicial review over arbitral awards in substantially similar circumstances.⁸⁴ On the other hand, the Fifth Circuit decision in *Gateway* was not the end of the debate.

⁸⁰ *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

⁸¹ *Id.* at 997.

⁸² *Id.*

⁸³ *See id.* at 996–97 (citing, *inter alia*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (enforcing a contractual provision mandating arbitration in Tokyo, Japan); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995) (saying that the FAA “intended courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts”); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989) (concluding that appellant had no right to compel arbitration because the parties’ agreement did not require arbitration to proceed in this situation)).

⁸⁴ *See Collins v. Blue Cross Blue Shield*, 916 F. Supp. 638, 641–42 (E.D. Mich. 1995) (upholding an “errors of law” contractual standard of review); *Fils et Cables d’Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243–44 (S.D.N.Y. 1984) (upholding a contractual grant of the power to review an award for errors of law and fact); *Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 633–34 (Ga. Ct. App. 1995) (holding that a contractual provision providing that a reviewing court “may also vacate, modify or correct the award if the conclusions of law are contrary to law, or if the findings of fact are not supported by the facts,” is enforceable).

2. *Preserving the Integrity of the Arbitral Process*

In *LaPine Technology Corp. v. Kyocera Corp.*,⁸⁵ the United States District Court for the Northern District of California held that while parties may contract freely with respect to the manner in which they arbitrate their disputes, they may not, by agreement, expand the provisions for judicial review contained in the FAA.⁸⁶ *LaPine* concerned the enforceability of an arbitral award conducted before a panel of the International Court of Arbitration of the International Chamber of Commerce (ICC).⁸⁷ The underlying dispute concerned an agreement between LaPine Technology Corporation (LaPine), Kyocera Corporation (Kyocera), and Prudential Capital and Investment Services, Inc. (Prudential). In short, the agreement provided for the design, manufacture, and marketing of a computer disk drive whereby LaPine was to design and market the product, Prudential was to finance the product, and Kyocera was to actually manufacture the disk drive.⁸⁸

The project ran into immediate financial problems and a complicated reorganization of the parties' agreement commenced.⁸⁹ Eventually, the parties entered into a definitive agreement that contained an arbitration agreement in the event of disputes. The arbitration agreement provided for arbitration in accordance with the Rules of Conciliation and Arbitration of the ICC.⁹⁰ The arbitral agreement also stated that any corresponding award shall be vacated or modified not only on the basis of the FAA but also when an enforcing court finds that the award was based on errors of fact or law.⁹¹ The ICC arbitral panel rendered an award in LaPine's favor and against Kyocera, and, thereafter, LaPine moved the court to confirm the arbitral award while Kyocera moved the court to vacate the award.⁹² Kyocera's main contention was that the arbitrators had made errors of fact and law; consequently, according to the parties' agreement to arbitrate, the district court should vacate the arbitral award.⁹³

⁸⁵ 909 F. Supp. 697 (N.D. Cal. 1995), *rev'd*, 130 F.3d 884 (9th Cir. 1997).

⁸⁶ *See id.* at 703.

⁸⁷ *See id.* at 698–99.

⁸⁸ *See id.* at 699.

⁸⁹ *See id.* at 700–01.

⁹⁰ *See id.* at 702; *see also* RULES OF CONCILIATION AND ARBITRATION (Int'l Chamber of Commerce 1988).

⁹¹ *See LaPine*, 909 F. Supp. at 702.

⁹² *See id.* at 701.

⁹³ *See id.* at 701–02.

The district court held that while parties may contract freely with respect to the manner in which they arbitrate their disputes, parties may not by agreement alter by expansion the provisions for judicial review contained in the FAA.⁹⁴ The court specifically cited and took judicial notice of *Gateway* and other decisions upholding contractual provisions that expand a court's review of awards but declined to follow those decisions.⁹⁵

The court's reasoning was twofold. First, the court reasoned that federal jurisdiction cannot be created by contract and that the role of the federal courts cannot be subverted to serve the private interest at the whim of the contracting parties. In other words, while parties may regulate fully by agreement the conduct of arbitration proceedings, they may not enlarge the adjudicatory process by enlarging the limits upon it set by statute.⁹⁶ Second, the court reasoned that allowing parties to expand the scope of judicial review contractually was repugnant to public policy. Arbitration, reasoned the court, is motivated by a desire to avoid the delay and costs of a judicial trial, and, in this regard, a court should refrain from substituting its judgment for that of the arbitrator's in order to assure the finality of an award.⁹⁷ Therefore, the court held that a more serious obstacle to the contractual expansion of judicial review was grounded in public policy—the public policy that supports arbitration and those aspects of arbitration that are beneficial to the parties as well as to the courts whose responsibilities are eased by alternative forms of dispute resolution.⁹⁸

The district court decision in *LaPine* is not without judicial authority and persuasive precedent. In *Chicago Typographical Union No. 16 v. Chicago Sun-Times*,⁹⁹ Judge Posner of the Seventh Circuit held that parties to an arbitration agreement could not contract for judicial review of an award because a court's jurisdiction cannot be created by contract. Furthermore, the court's deference to the public policy behind arbitration, especially in light of the FAA and the New York Convention,¹⁰⁰ demonstrates an attempt to protect the integrity of the arbitral process, because allowing parties to

⁹⁴ See *id.* at 703.

⁹⁵ See *id.* at 702–04 (citing *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 242 (S.D.N.Y. 1984)).

⁹⁶ See *id.* at 703.

⁹⁷ See *id.* at 705.

⁹⁸ See *id.* at 705–06. The court severed the provision expanding judicial review from the rest of the agreement and proceeded to review the ICC arbitral award on the basis of the FAA. The court found the award valid and enforceable. See *id.* at 706–09.

⁹⁹ 935 F.2d 1501 (7th Cir. 1991).

¹⁰⁰ See *supra* notes 2–10 and accompanying text.

expand judicial review contractually, in contrast to the limited review offered by statute, would serve to diminish the reputation of commercial arbitration as an effective form of alternative dispute resolution.¹⁰¹ However, such public policy concerns are not implicated when parties to an arbitral agreement contract for limited judicial review.

Nevertheless, the Ninth Circuit reversed the district court's decision in *LaPine*.¹⁰² The Ninth Circuit sided with the Fifth Circuit's reasoning in the *Gateway* decision and held that the parties' agreement to expand judicial review must be honored.¹⁰³ The Ninth Circuit cited the same Supreme Court cases cited by the Fifth Circuit on the freedom of contract and held that the purpose behind the FAA was not to relieve overburdened court dockets, but merely to avert judicial interference with the contractual rights of parties to arbitration agreements.¹⁰⁴ However, the Ninth Circuit, as the Fifth Circuit, failed to consider the difference between freedom of contract regarding procedural rules rather than substantive rules and failed to consider the interplay between the FAA and the New York Convention. These considerations indicate that contractual expansion of judicial review is not appropriate, especially in international arbitrations, and that the district court in *LaPine* came to the proper conclusion.

B. Contractual Limitation of Judicial Review

Despite the limited standard of judicial review offered by the FAA and the New York Convention, parties to arbitral agreements may wish to limit the possibility and purview of judicial review further. The intent behind further limitation of judicial review at the award enforcement stage is obvious—parties enter into arbitral agreements to avoid the necessity and cost of litigating a controversy in a national court; therefore, protracted litigation at the award enforcement stage would serve to counter any benefits bestowed by the initial choice of arbitration as an alternative dispute resolution technique. This overriding policy objective is enhanced only when the arbitration is of an international nature. In an international arbitration, the various parties hail from differing nations which may have vastly

¹⁰¹ See *supra* notes 13–14 and accompanying text.

¹⁰² See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997).

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 890–91 (citing *First Options, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995); *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

different legal systems. Consequently, arbitration may be the only effective compromise if a dispute arises. If, after a successful arbitration, such parties still are faced with prolonged and costly award enforcement litigation in a foreign court, all the benefits of arbitration would be destroyed, especially the neutral forum so cherished by participants in international trade.¹⁰⁵ As a result, some parties to an arbitral agreement find it prudent to foreclose the possibility of disputing an arbitral award in a national court. Such a foreclosure either may be expressed directly in an agreement to arbitrate or may be implied through the selection of certain rules governing the arbitral process.

1. *Express Limitation of Judicial Review—Exclusion Agreements*

Other than the New York Convention, English law on arbitration basically was combined in three national acts, each of which added a facet to English arbitration law. These acts include the Arbitration Act of 1950,¹⁰⁶ the Arbitration Act of 1975,¹⁰⁷ and the Arbitration Act of 1979.¹⁰⁸ Many of the provisions of these acts have been repealed by, and were consolidated and recodified in, the Arbitration Act of 1996.¹⁰⁹ According to the Arbitration Act of 1996, parties to an arbitration may, before or after a dispute arises, agree in writing to waive the right to bring questions of law before the courts.¹¹⁰ The effect of such an agreement is to eliminate most judicial review of arbitral awards rendered in England. Until 1996, these “exclusion agreements,” as they are commonly called, were valid only in international arbitrations and were not recognized when all the parties involved were British, unless the exclusion agreement was entered into after the commencement of arbitral proceedings.¹¹¹

However, an arbitral award still can be set aside for lack of “substantive jurisdiction,”¹¹² “serious irregularity affecting the [arbitral] tribunal, the

¹⁰⁵ See Ray Y. Chan, Note, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromally*, B.U. INT'L L.J. 141, 174 (1999) (referring to the “obvious needs of international trade for a neutral forum of dispute resolution”).

¹⁰⁶ Arbitration Act, 1950, 14 & 15 Geo. 6, ch. 27, §§ 1–34, 42(3) (Eng.) (repealed 1996).

¹⁰⁷ Arbitration Act, 1975, ch. 3, §§ 1–8 (Eng.) (repealed 1996).

¹⁰⁸ Arbitration Act, 1979, ch. 42, §§ 1–8 (Eng.) (repealed 1996).

¹⁰⁹ Arbitration Act, 1996, ch. 23, §§ 1–10 (Eng.).

¹¹⁰ See *id.* §§ 5, 6(1), 69(1).

¹¹¹ See Arbitration Act, 1979, ch. 42, § 3(6) (repealed 1996).

¹¹² Arbitration Act, 1996, ch. 23, § 67(3).

[arbitral] proceedings or the [arbitral] award,”¹¹³ and for an arbitrator’s mistake in determining “a question of law arising out of an award made in the proceedings.”¹¹⁴ Under the Arbitration Act of 1979, an exclusion agreement under English law was required to be in writing but needed not expressly be labeled an exclusion agreement. In fact, the text of the 1979 Act specifically stated that an agreement could be an exclusion agreement “whether or not it form[ed] part of an arbitration agreement.”¹¹⁵ Consequently, an exclusion agreement could exist even outside the context of the arbitral agreement. In this regard, courts have found the use of exclusion agreements by the mere implied reference to the binding nature of arbitral awards located in the procedural rules chosen by the parties to govern the arbitral process.

2. *Implied Limitation of Judicial Review—Selection of Governing Rules*

English courts have interpreted the definition of “exclusion agreement” liberally. For example, in *Marine Contractors, Inc. v. Shell Petroleum Development Ltd.*,¹¹⁶ the English Court of Appeal held that a valid exclusion agreement was incorporated by the parties by their selection of the ICC Rules of Conciliation and Arbitration as governing the procedure of the arbitral process. In *Marine Contractors*, Marine Contractors, Inc. (Marine) contracted with Petroleum Development of Nigeria Ltd. (Shell) to lay oil pipeline in Nigeria.¹¹⁷ The contract contained an arbitral clause providing for the arbitration of any disputes in London under the auspices of the ICC.¹¹⁸ The arbitrator made an interim award and Marine applied for leave to appeal, which the court denied, holding that a valid exclusion agreement existed.¹¹⁹

¹¹³ *Id.* § 68(3); see also William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 693 (1989).

¹¹⁴ Arbitration Act, 1996, ch. 23, § 69(1); see also *id.* § 69(7).

¹¹⁵ Arbitration Act, 1979, ch. 42, § 3 (repealed 1996). It should be noted that Belgium has gone one step further than merely *allowing* exclusion agreements. Belgian law *mandates* that if all the parties to an arbitration are foreign, a corresponding arbitral award rendered in Belgium is not subject to an action for annulment. See CODE OF JUDICIAIRE art. 1717 (Belg.).

¹¹⁶ 2 Lloyd’s Rep. 77 (C.A. 1984).

¹¹⁷ See *id.* at 78–79.

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 78.

The court interpreted Article 24 of the ICC Rules of Conciliation and Arbitration,¹²⁰ which provides that a corresponding "arbitral award shall be final" and that by submitting the dispute to arbitration by the ICC "the parties shall be deemed . . . to have waived their right to any form of appeal insofar as such waiver can validly be made," as by implication forming an exclusion agreement.¹²¹ Therefore, in England, a valid exclusion agreement need not be expressed specifically by the parties but may be implied through the selection of a set of procedural rules waiving the right to appeal.¹²²

The implied formation of an exclusion agreement is not necessarily a phenomenon limited to English courts. In *CBI NZ Ltd. v. Badger Chiyoda*,¹²³ the New Zealand Court of Appeal upheld the implied incorporation of an exclusion agreement through the use of the ICC Rules even in the face of a public policy challenge. The New Zealand court reasoned that the implied exclusion agreement was valid and not contrary to public policy because "modern public policy points strongly towards non-interference with arbitral decisions if the parties clearly intended them to be final."¹²⁴ Nevertheless, the court did place at least two restrictions on the use of implied exclusion agreements. First, the court held that arbitrator misconduct and an arbitration in excess of the terms of reference remained opened to appeal notwithstanding the implied use of an exclusion agreement. Second, the court held that it still may intervene if unequal bargaining power or exploitation of a monopoly position forced a party to submit to an exclusion agreement.¹²⁵

The use of exclusion agreements in commonwealth and continental European nations has gained popularity in the last few decades, although this trend is yet to cross the Atlantic into the United States.¹²⁶ The increased use

¹²⁰ See RULES OF CONCILIATION AND ARBITRATION, RULES OF ARBITRATION art. 24 (International Chamber of Commerce 1988).

¹²¹ *Id.*; see also *Marine Contractors*, 2 Lloyd's Rep. at 79.

¹²² See *Marine Contractors*, 2 Lloyd's Rep. at 79; see also *Arab African Energy Corp. v. Olieprodukten Nederland, B.V.*, 2 Lloyd's Rep. 419, 423 (Q.B. Div'l Ct. 1983) (holding that the Arbitration Act of 1979 did not require "the overt demonstration of an intention to exclude the right of appeal"; thus, the inclusion of the ICC Rules of Conciliation and Arbitration was sufficient evidence of an exclusion agreement).

¹²³ [1989] 2 N.Z.L.R. 669.

¹²⁴ *Id.* at 680.

¹²⁵ See *id.* at 679. The New Zealand Court of Appeal recognized the probability that one party would have such an unequal bargaining position so as to justify the nullification of an exclusion agreement was slight in an international arbitration but more likely in a domestic arbitration. See *id.*

¹²⁶ There appears to be no real mention of "exclusion agreements" in American law, although some cases tend to hint at the acceptance of contractual limitation of judicial

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of exclusion agreements demonstrates the integrity of the arbitral process and the trust that parties to an arbitral agreement have in such a process. The use of exclusion agreements not only will assure the uninterrupted enforcement of arbitral awards, but also will promote the intentions of the parties in agreeing to arbitrate disputes. However, concerns over the lack of any judicial review in the event that the integrity of the arbitral process erodes is still a major concern. Furthermore, how courts should reconcile the increased use of the contractual expansion of judicial review versus the increased use of contractual limitation of judicial review presents a public policy quagmire that warrants further discussion.

IV. RECONCILING THE CONTRACTUAL EXPANSION AND LIMITATION OF JUDICIAL REVIEW

As parties to both national and international agreements to arbitrate continue to experiment with contractual clauses that either expand or limit judicial review of arbitral awards, the dichotomy between the seemingly competing public policy forces of contractual freedom and award enforcement will become further pronounced. However, the seemingly irreconcilable conflict between freedom to contract and strict award enforcement can best be resolved by evaluating these two public policy viewpoints in connection with the two major goals of the FAA and the New York Convention.

The drafters of the FAA and the New York Convention envisioned an arbitration system whereby national tribunals would not only recognize and enforce agreements to arbitrate, but also would recognize and strictly enforce corresponding arbitral awards. Only if these two goals are met will arbitration become a viable alternative dispute resolution technique for parties. By evaluating contractual expansion and limitation of judicial review in the context of these two goals, contractual freedom can be expanded while still maintaining the overall integrity of the arbitral process.

A. Procedural Versus Substantive Freedom of Contract

The Fifth and Ninth Circuits in the *Gateway* and *LaPine* decisions relied heavily upon the notion of freedom of contract in upholding contractual

review. For example, in *Westinghouse Electric Corp. v. New York City Transit Authority*, 14 F.3d 818 (2d Cir. 1994), the Second Circuit upheld an arbitral clause that limited judicial review to an “arbitrary and capricious” standard, *see id.* at 822–23.

expansion of judicial review.¹²⁷ However, both the Fifth and Ninth Circuits failed to realize the difference between procedural and substantive freedom of contract. The district court in the *LaPine* decision touched upon this concern but did not elaborate, merely stating that enlargement of judicial review was outside of the permissible range of a party's freedom of contract.¹²⁸ Nevertheless, the district court made the right decision even though its reasoning was not fully developed.

The appellate decisions in *Gateway* and *LaPine* both relied on a multitude of decisions enforcing the parties' freedom of contract in regards to various aspects of the arbitral process.¹²⁹ However, all of these decisions concerned the scope and procedural regulations of the arbitral process, not the substantive enforcement of awards or of the arbitration agreement itself. For instance, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,¹³⁰ the United States Supreme Court upheld a California appellate court's decision holding that parties may contract for the California Rules of Arbitration, rather than the FAA, to govern the procedural regulations of their arbitration.¹³¹

Moreover, the United States Supreme Court has upheld parties' contractual freedom as to the scope of the arbitration and the issues an arbitrator is empowered to decide. For instance, parties are free to contract as to whether arbitrators will have the authority to award punitive damages¹³² and are even free to grant the arbitrators the power to decide the

¹²⁷ See generally *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995); *supra* notes 63–74, 89–90 and accompanying text.

¹²⁸ See *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 705 (N.D. Cal. 1995), *rev'd*, 130 F.3d 884. The district court relied heavily upon the Seventh Circuit decision in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). However, as rightly pointed out by the appellate court in *LaPine*, the Seventh Circuit only in dicta asserted that federal jurisdiction could not be created by contract and declined to explain its reasoning. See *LaPine*, 130 F.3d at 890.

¹²⁹ See, e.g., *LaPine*, 130 F.3d at 888 (citing, *inter alia*, *First Options, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (enforcing an arbitral agreement limiting the scope of the issues submitted to arbitration); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995) (enforcing an agreement to arbitrate and upholding the resulting arbitral award of punitive damages despite contrary state law)); see also *Gateway*, 64 F.3d at 997 (citing, *inter alia*, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (stating that courts should "rigorously enforce agreements to arbitrate")).

¹³⁰ 489 U.S. 468 (1989).

¹³¹ See *id.* at 468–69.

¹³² See *Mastrobuono*, 514 U.S. at 56–57.

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arbitrability issue itself.¹³³ Finally, parties are free to contract as to the forum in which any judicial dispute concerning the arbitration agreement or award may be commenced.¹³⁴ Consequently, it is undisputed that the powers of an arbitrator derive from, and are limited by, the agreement to arbitrate.¹³⁵

Nevertheless, while parties are free to contract as to the procedure, scope, and forum of an arbitration, parties are not necessarily free to contract as to the extent of judicial review of an arbitral award.¹³⁶ An expansion of judicial review would go beyond merely contracting as to the scope or procedure of the arbitration and would be contracting as to the substantive enforcement of the award. Such a process would contradict the limited judicial review standards enunciated in the FAA and New York Convention. In fact, the majority of exceptions to award enforcement in the FAA and New York Convention deal with procedural irregularities to assure that the parties' freedom to contract for arbitration does not impermissibly overstep all bounds of fairness and justice.¹³⁷ Only the public policy exception encompasses a substantive review of the arbitral award, and even this exception is narrowly interpreted to protect the integrity of the arbitral process.¹³⁸

In short, parties should be allowed to negotiate contractually as to the scope and procedure of arbitration, but not as to the substantive enforcement of arbitral agreements or awards. Such appears to have been the case in the United States Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.¹³⁹ In *Volt*, the parties to a contract agreed not only to arbitrate all disputes between the parties but also included a provision in the contract that the law of California

¹³³ See Kaplan, 514 U.S. at 943–44. However, granting parties the right to decide the arbitrability of an issue may encroach impermissibly upon the public policy exception to award enforcement. See Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT'L ARB. 1, 17–18 (1995); see also discussion *infra* Part II.B.

¹³⁴ See *McDermott Int'l, Inc. v. Lloyds Underwriters*, 944 F.2d 1199, 1208–09 (5th Cir. 1991).

¹³⁵ See *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1002 (Cal. 1994).

¹³⁶ See, e.g., *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

¹³⁷ See Federal Arbitration Act §§ 10–11, 9 U.S.C. §§ 10–11 (1994), New York Convention, *supra* note 4, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42.

¹³⁸ See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta)*, 508 F.2d 969, 974 (2d Cir. 1974); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987).

¹³⁹ 489 U.S. 468 (1989).

would govern all disputes.¹⁴⁰ However, the California Arbitration Act contained a provision allowing a court to stay arbitration pending the resolution of a related litigation, while the FAA contained no such provision. As a result, the party opposing arbitration argued that the choice of California law violated the provisions of the FAA.¹⁴¹

The United States Supreme Court recognized that section 4 of the FAA, on enforcement of arbitral agreements, “does not confer a right to compel arbitration of any dispute at any time, [but merely] confers . . . the right to obtain an order directing that ‘arbitration *proceed* in the manner provided for in [the parties’] agreement.’”¹⁴² The Court went on to reason that the California Arbitration Act did not offend the federal policy favoring arbitration since there is no federal policy favoring arbitration “under a certain set of procedural rules.”¹⁴³ Consequently, the Court held that by permitting courts to enforce rigorously such arbitration agreements according to their terms, the Court would give effect to the contractual rights and expectations of the parties without doing violence to the policies behind the FAA.¹⁴⁴

In conclusion, the Supreme Court in *Volt* reaffirmed the right of parties to contract as to the procedural rules of an arbitration because such freedom of contract would not interfere with the policies of the FAA to favor arbitration and arbitral agreements.¹⁴⁵ However, to allow parties to contract as to substantive enforcement would endanger the integrity of the arbitral process and hamper the effectiveness of arbitration as an alternative dispute resolution technique, thereby “doing violence” to the policies behind the FAA.¹⁴⁶ These concerns are further highlighted when the arbitration and parties are international in nature.

B. *The FAA Versus the New York Convention*

The United States enacted the FAA on February 12, 1925.¹⁴⁷ As stated before, the goal of the FAA was to place arbitration agreements “upon the

¹⁴⁰ See *id.* at 470.

¹⁴¹ See *id.* at 471–72.

¹⁴² See *id.* at 474–75 (quoting Federal Arbitration Act § 4, 9 U.S.C. § 4 (1994)) (emphasis added and removed) (bracketed alteration in original).

¹⁴³ *Id.* at 476.

¹⁴⁴ See *id.* at 479.

¹⁴⁵ See *id.* at 478–79.

¹⁴⁶ *Id.* at 479.

¹⁴⁷ See Federal Arbitration Act § 1, 9 U.S.C. § 1 note (1994) (Derivation).

same footing as other contracts.”¹⁴⁸ On the other hand, Congress, in passing the FAA, also recognized the benefits offered by arbitration, especially the fact that arbitration of disputes is usually less costly and time consuming than litigation.¹⁴⁹ However, in *Dean Witter Reynolds, Inc. v. Byrd*,¹⁵⁰ the United States Supreme Court held that the overriding concern of Congress in passing the FAA was to assure enforcement of agreements into which parties had entered, not to realize and promote the benefits of arbitration.¹⁵¹

Therefore, federal courts consistently have held that the FAA preempts state laws that tend to interfere with parties’ contractual right to enter into arbitration agreements. For instance, in *Southland Corp. v. Keating*,¹⁵² the United States Supreme Court ruled that a provision of the California Franchise Investment Law requiring judicial interpretation of claims arising under that law violated the federal provisions of the FAA and, as a result, allowed the arbitration of various claims under the law.¹⁵³ Similarly, three years later, the Supreme Court held that the FAA preempted a provision of the California Labor Code that purportedly authorized employees access to the courts in an action for wages despite the existence of an agreement to arbitrate such controversies.¹⁵⁴ Since such rulings, federal courts consistently have held that the FAA preempts state laws that limit parties’ ability to enter into arbitration agreements.¹⁵⁵

The United States acceded to and enacted the New York Convention on July 31, 1970.¹⁵⁶ The underlying goals of the New York Convention differ

¹⁴⁸ H.R. REP. NO. 68-96, at 1 (1924); *see also supra* notes 2–3.

¹⁴⁹ The House Report accompanying the FAA stated that “[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.” H.R. REP. NO. 68-96, at 2 (1924).

¹⁵⁰ 470 U.S. 213 (1985).

¹⁵¹ *See id.* at 218–19.

¹⁵² 465 U.S. 1 (1984).

¹⁵³ *See id.* at 11, 14, 16.

¹⁵⁴ *See Perry v. Thomas*, 482 U.S. 483, 490–91 (1987).

¹⁵⁵ *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (declaring unlawful any state policy that will uphold a contract but will not enforce an agreement to arbitrate located in such a contract); *Baravati v. Josephtahl, Lyon & Ross, Inc.* 28 F.3d 704, 711 (7th Cir. 1994) (holding that the FAA preempts an Illinois rule concerning the award of punitive damages by arbitrators); *S+L+H S.P.A., Viale F. Cessani 15 24047 Treviglio, Italy v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1526–27 (7th Cir. 1993) (holding that a provision of the Wisconsin Fair Dealership Law could not void an arbitration agreement).

¹⁵⁶ *See supra* note 4 and accompanying text.

from those of the FAA. The primary goal underlying the adoption and implementation of the New York Convention by the United States was to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries."¹⁵⁷ The rationale behind unifying standards in regards to the recognition and enforcement of arbitral agreements is rooted in the very nature of international transactions. At times, parties to an international transaction desire an independent and neutral forum in the event any disputes arise. For instance, a foreign corporation may, rightly or wrongly, be apprehensive over litigating a dispute in the courts of its adversaries' nations. This is particularly true when one of the parties is a state-owned or state-supported entity.¹⁵⁸ Consequently, the New York Convention presented an opportunity to unify international standards of arbitration in order to promote arbitration as an alternative method of dispute resolution.¹⁵⁹

In fact, just as the FAA preempts any contradictory state laws, the New York Convention preempts any contradictory provisions of the FAA whenever an arbitration agreement is international in nature, that is, between parties that are not entirely U.S. citizens. For example, in *McDermott International v. Lloyds Underwriters*,¹⁶⁰ the Fifth Circuit held that the FAA's requirement that both parties' consent before an arbitral award could be affirmed was preempted by the New York Convention, which does not require consent for confirmation.¹⁶¹ The Fifth Circuit reasoned that the FAA is the approximate domestic equivalent of the New York Convention, such that the New York Convention incorporates the FAA except where the FAA conflicts with the New York Convention's specific provisions.¹⁶²

The differing goals of the FAA and the New York Convention and the difference between substantive and procedural freedom of contract may shed light upon whether parties should be allowed to expand or limit judicial review over arbitral awards. The goals of the FAA and the New York

¹⁵⁷ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (citing CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, S. EXEC. DOC. E (2d Sess. 1968)).

¹⁵⁸ See John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 379 (1986); Harry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 64-67 (1982).

¹⁵⁹ See de Vries, *supra* note 158, at 56-57.

¹⁶⁰ 120 F.3d 583 (5th Cir. 1997).

¹⁶¹ See *id.* at 588-89.

¹⁶² See *id.* at 588.

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Convention can be reconciled and promoted by allowing contractual limitation of judicial review and disallowing contractual expansion.

C. Contractual Expansion Versus Contractual Limitation of Judicial Review

As discussed above, national tribunals not only have recognized the ability of parties to expand judicial review of arbitral awards contractually, but also have recognized the right to limit judicial review contractually.¹⁶³ However, while the contractual limitation of judicial review tends to promote the overall goals of both the FAA and the New York Convention, contractual expansion tends to contradict, at least in part, some of the goals of the FAA and the New York Convention. Nevertheless, the seemingly irreconcilable conflict between the twin goals of promoting freedom of contract in regard to arbitral agreements and the strict enforcement of arbitral awards is not as irreconcilable as the conflict first appears.

The first step to reconciling contractual expansion and limitation of the judicial review of arbitral awards is to recognize the difference in the types of contractual expansion and limitation. Arbitration is not a judicial process but rather is an alternative method of dispute resolution with differing rules, regulations, and procedures. In fact, there are literally hundreds of differing procedural rules and regulations promulgated not only by national and state legislatures but also by private institutions such as the American Arbitration Association and the ICC. As a result, parties considering arbitration have no dearth of arbitration rules from which to choose. Moreover, parties commonly contractually choose a particular set of rules to apply to any dispute and may even modify portions of those rules contractually. Therefore, allowing parties to contract freely as to procedural rules and the scope of any arbitration not only promotes freedom of contract, but also promotes arbitration as an alternative dispute resolution technique.

On the other hand, the substantive review and enforcement of arbitral awards by national courts is severely restricted in the United States by the FAA and internationally by the New York Convention. Allowing parties to expand such review contractually certainly would also expand the parties' freedom of contract, but would also endanger the goal of the FAA and the New York Convention of assuring certainty and predictability in the enforcement of arbitral awards. However, allowing parties to limit contractually the already stringent standards of judicial review not only

¹⁶³ See *supra* Part III.

would expand freedom of contract, but also would increase the certainty and predictability of award enforcement.

The desire for certainty and predictability in award enforcement is self-evident in an international arbitration but is also applicable in a purely domestic arbitration. For example, if an Alaskan corporation enters into a contract with a Florida corporation to provide needed raw materials, the two corporations may decide to arbitrate any disputes in Los Angeles County, California—a neutral forum and a relatively halfway point between the home bases of the two corporations. If the Florida corporation is successful, any corresponding arbitral award would have to be recognized by the Alaskan courts in order for the Florida corporation to seize any assets of the Alaskan corporation to satisfy the arbitral award. The award enforcement procedure may be jeopardized if the Alaskan courts can review the arbitral award *de novo*, and the Florida corporation may find itself relitigating the dispute in the Alaskan courts, which is exactly what the Florida corporation sought to avoid in entering into an arbitration agreement.

The district court in *LaPine* appeared to recognize to an extent the difference between procedural and substantive freedom of contract.¹⁶⁴ However, the district court failed to elaborate further on the public policy considerations of the same, but rather it merely held that parties to an arbitration agreement could not upset the judicial review limits set by statute—presumably neither enlarging nor limiting such review.¹⁶⁵ On review, the Ninth Circuit failed to recognize the public policy differences in procedural versus substantive contractual expansion and limitation. The Ninth Circuit merely held that the FAA was not designed to “avert overburdened court dockets.”¹⁶⁶ The Ninth Circuit failed to grasp that contractual expansion of judicial review interferes with one of the main reasons parties enter into arbitral agreements, that is, to avoid the judicial process and being subjected to the courts of an adversary. Strict adherence to the notion of freedom of contract in allowing expansion of judicial review is perhaps merely a revival of the old judicial hostility towards arbitration that the FAA sought to remedy.¹⁶⁷

The second step to reconciling contractual expansion and limitation is to recognize the difference between national and international arbitration. As discussed above, the underlying goals of the FAA and the New York Convention differ in that the FAA sought to reverse past judicial hostility

¹⁶⁴ See *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 703 (N.D. Cal. 1995), *rev'd*, 130 F.3d 884, 891 (9th Cir. 1997).

¹⁶⁵ See *id.*

¹⁶⁶ *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 890–91 (9th Cir. 1997).

¹⁶⁷ See *supra* note 3 and accompanying text.

toward arbitration, while the New York Convention sought to unify international standards by which agreements to arbitrate and arbitral awards are enforced.¹⁶⁸ The rationale behind the New York Convention is self-evident—the primary reason why parties to an international transaction desire arbitration is to assure that any disputes are resolved in a neutral forum rather than the national courts of one of the parties.¹⁶⁹ The desire for a neutral forum is even more pronounced where one of the parties is a state-owned or supported enterprise.¹⁷⁰ To relieve these concerns, the New York Convention dictates that arbitral awards will be recognized in the court of a signatory nation except in a few limited circumstances.¹⁷¹

In the international context, contractual limitation of judicial review enhances both the parties' freedom of contract and the desire to assure the enforceability of any corresponding arbitral award. On the other hand, contractual expansion of judicial review could serve as a mechanism to circumvent the goal of the New York Convention to unify national laws on arbitration in order to promote international trade and commerce. The district court and the Ninth Circuit in the *LaPine* case both failed to recognize this critical difference. The *LaPine* case involved the quintessential international transaction—a sale of goods between an American and a Japanese corporation.¹⁷² As a result, the New York Convention should have applied to the transaction, not the FAA.¹⁷³ Nevertheless, the Ninth Circuit in *LaPine* only discussed the FAA and not the New York Convention¹⁷⁴ even though the goals and provisions of the New York Convention should have taken precedence over those of the FAA. In short,

[i]f the United States is to be able to gain the benefits of international accords [such as the New York Convention] and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious in

¹⁶⁸ See *infra* Part IV.B.

¹⁶⁹ See Chan, *supra* note 105, at 174.

¹⁷⁰ See Allison, *supra* note 158, at 379.

¹⁷¹ See discussion *infra* Part II.

¹⁷² See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 886–87 (9th Cir. 1997).

¹⁷³ One can contrast the *LaPine* case with the Fifth Circuit *Gateway* case, which was essentially a sales and service contract between two domestic corporations. Compare *LaPine*, 130 F.3d at 886, with *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 995–96 (5th Cir. 1995).

¹⁷⁴ See *LaPine*, 130 F.3d at 887–91.

applying goals from domestic legislation [such as the FAA] in such a manner as to violate international agreements.¹⁷⁵

Reconciling the goals of the FAA and the New York Convention when considering the validity of contractual expansion or limitation of judicial review is a relatively simple matter. First, one must determine if the contractual provision effects a procedural or substantive rule of arbitration. Procedural rules can always be revised by contract, but substantive rules should only be allowed to be revised when they will further promote not only freedom of contract but also the underlying desire to have certainty and predictability in the enforcement of an arbitral decision. Second, one must determine if the arbitration is of a domestic or international nature. In an international arbitration, the goals of uniformity, certainty, and predictability should take precedence over freedom of contract, or else the use of international arbitration would be jeopardized. Therefore, in almost all situations, contractual limitation of judicial review should be allowed while contractual expansion beyond that offered by the FAA and the New York Convention as to the substantive review of an award should be disallowed. A stringent adherence to the freedom of contract notion in all situations, including contractual expansion of judicial review, would serve only to damage the integrity of the arbitral process and serve to reincarnate the old judicial hostility toward arbitration that was thought to be buried by the FAA.

V. CONCLUSION

In conclusion, in recent decades arbitration increasingly has become a desirable alternative to litigation as a method of dispute resolution, especially between parties of differing nationalities. In order to promote arbitration, the United States enacted both the FAA and the New York Convention. Both of these legislative enactments severely limit judicial review of the arbitral process and any corresponding award. In recent years, parties have attempted either to expand or limit judicial review of arbitral awards contractually. Provisions expanding or limiting judicial review have been held enforceable under the doctrine of freedom of contract. However, contractual expansion of judicial review can have adverse effects on the integrity of the arbitral process. This is especially true in an international context. Consequently, a strict, unguided adherence to the principle of

¹⁷⁵ *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

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freedom of contract needs to be tempered with a respect for the arbitral process and the goals of both the FAA and the New York Convention.

